

N O. 2 1 7 5 9 /

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT CLAYTON BUICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

WM. MATTHEW BYRNE, JR.,  
United States Attorney,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
DENNIS E. KINNAIRD,  
Assistant U. S. Attorney,

1200 U. S. Court House  
312 North Spring Street  
Los Angeles, California 90012

FILED

FEB 29 1968

WM. B. LUCK, CLERK

Attorneys for Appellee,  
United States of America.

MAR 2 1968



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Assistant U. S. Attorney,

1200 U. S. Court House  
312 North Spring Street  
Los Angeles, California 90012

Attorneys for Appellee,  
United States of America.



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Text

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I

JURISDICTIONAL STATEMENT

Appellant, Robert Clayton Buick (hereinafter referred to as "Buick"), was indicted by the Federal Grand Jury for the Southern District of California on April 20, 1966 [C. T. 1]. <sup>1/</sup> The indictment contained 22 counts alleging that on specific dates from July 29, 1961, and continuing to on or about February 7, 1966, Buick did rob 22 Federally insured savings and loan associations in violation of Title 18, United States Code, Section 2113(a) and (d)

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<sup>1/</sup> C. T. refers to Clerk's Transcript.



[C. T. 1-22].

On April 25, 1966, Buick was arraigned in Los Angeles, California, and the matter was continued for entry of plea [C. T. 23]. On May 9, 1966, Buick entered a plea of not guilty to all counts of the indictment [C. T. 24]. On June 20, 1966, Buick moved to sever counts for trial and it was ordered that the trial would commence on September 26, 1966, on Counts 19, 20, 21 and 22 [C. T. 32]. On July 1, 1966, a psychiatric hearing was held and the court found that Buick was presently sane and able to proceed in the case and properly assist in his defense [C. T. 37]. On September 12, 1966, the court continued the trial to October 11, 1966, and granted Buick's motion to appear in pro per with the assistance of previous counsel Mrs. Root, and appointed two additional psychiatrists to examine Buick [C. T. 43]. On September 23, 1966, the court again found Buick sane and able to proceed to trial. In addition, Buick's request to be relieved as acting in pro per and have Mrs. Root reinstated as his attorney at trial was granted [C. T. 55].

The trial by jury commenced on October 11, 1966, before the Honorable Irving Hill, United States District Judge [C. T. 87]. On October 17, 1966, the court held a hearing out of the presence of the jury on Buick's motion to suppress evidence. After presenting evidence and hearing argument the court denied Buick's motion to suppress evidence [C. T. 95]. On October 19, 1966, the jury returned a verdict finding Buick guilty of the charges contained in Counts 20, 21 and 22 [C. T. 97].



On December 6, 1966, the court considered a motion filed by Buick as being a motion for a new trial and it was denied [C. T. 110]. On December 9, 1966, the defendant was sentenced to the custody of the Attorney General for a period of 20 years for the offense charged in Count 21, 20 years for Count 22 and 20 years for Count 23, said sentences to run concurrently and the sentence being pursuant to the provisions of Title 18, United States Code, Section 4208(a)(2) [C. T. 117]. On December 19, 1966, the court filed an order denying Buick's motion entitled Petition for a Hearing to Vacate Judgment of Conviction and To Set Aside Sentence of Robbery of a Savings and Loan Association; Use of a Dangerous Weapon [C. T. 119-120].

On December 16, 1966, a notice of appeal was filed by counsel for Buick [C. T. 128].

The jurisdiction of the District Court was based upon Section 2113(a) and (d) of Title 18, United States Code. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

## II

### SPECIFICATION OF ERRORS

1. Was the appellant deprived of any rights by having the wife of an FBI agent allegedly report pertinent testimony to the various witnesses in the witness room, contrary to the court's order?





2. That appellant was arrested without probable cause and thereafter appellant's constitutional rights were violated by an unreasonable search and seizure.

### III

#### STATEMENT OF FACTS

The original indictment returned against Buick alleged that he had committed 22 violations of Title 18, United States Code, Section 2113(a) and (d). Pursuant to the motion by Buick, the trial court severed the first 18 counts from the last four, and proceeded to trial on Counts 19, 20, 21 and 22 [C. T. 32]. At the trial of the case the United States did not present any evidence on the crime alleged in Count 19, and proceeded to prove only Counts 20, 21 and 22.

The Government first presented evidence that Mission Savings and Loan Association, located in Santa Ana, California, was robbed on October 26, 1965 [R. T. 126]. <sup>2/</sup> Mr. Daniel Backus testified that he observed Buick in the act of robbing the chief accountant and teller of Mission Savings and Loan Association [R. T. 130-131]. Mr. Crabtree, the chief accountant, testified that he saw Buick hold a small nickle or silver plated type gun on him and the teller and take money [R. T. 160 and 171]. Mrs. Denise Quillin testified that Buick approached her, displayed a Derringer

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<sup>2/</sup> R. T. refers to Reporter's Transcript.



type hand gun and she heard Buick state "Make it fast" in demanding the money [R. T. 189, 192-193 and 196]. Two additional witnesses, Mr. and Mrs. Hoffman, testified that they observed Buick exit from Mission Savings and Loan, pass through the parking lot and enter a green colored station wagon [R. T. 223-225 and 269-270].

The Government next presented evidence establishing that Buick robbed the Metropolitan Savings and Loan Association located in Long Beach, California, on January 31, 1966. The testimony presented in this case consisted of employees of the savings and loan association, who identified Buick as the individual who entered their association with a chrome Derringer type hand gun and demanded money [R. T. 329, 383 and 483].

The third and final crime on which evidence was presented by the Government, was the robbery of the Pacific Savings and Loan Association, located at Monterey Park, California, February 7, 1966. The Government presented testimony of three employees of Pacific Savings and Loan Association, to show that Buick was the individual who entered the association and used a small chrome Derringer type weapon in committing the robbery [R. T. 428, 543, 580, 607]. In addition, Mr. Kendrick, a retired police officer, testified that he saw Buick run from the scene of the crime and enter a car and speed away. Mr. Kendrick followed Buick for a considerable distance at high speeds until Buick pulled off a side road and stopped. At this time a brief struggle ensued in which Buick made good his escape. Mr. Kendrick wrote down the license



number of the automobile used by Buick, and gave this to the Federal Bureau of Investigation [R. T. 624-629]. The Government presented the official records of the Department of Motor Vehicles for the State of California, to establish that the last known registrant of the above mentioned license plate number recorded by Mr. Kendrick, was Robert Clayton Buick [R. T. 747-749].

In addition to the above mentioned eyewitness testimony the Government submitted in evidence a small chrome Derringer .38 pistol. On October 5, 1966, counsel for Buick filed a motion for the suppression of evidence with supporting points and authorities [C. T. 56-58]. On October 14, 1966, a stipulation was signed by Buick agreeing that the Government's Exhibit No. 1 for the motion to suppress was a copy of the memorandum referred to in the affidavit of Patrolman Kelly Whitehead, and in the testimony of Deputy Sheriff Ingram concerning the motion to suppress, and this was signed by respective counsel for the Government and the defendant [C. T. 61]. On October 7, 1966, Buick filed a declaration under penalty of perjury, setting forth the facts in support of the motion to suppress [C. T. 68-69]. In opposition to Buick's motion, the United States filed the affidavit of Gary Ingram, Deputy Sheriff of Reese County, Texas [C. T. 70-72], and the affidavit of Highway Patrolman Kelly Whitehead [C. T. 73-75]. All affidavits were admitted into evidence for the hearing on the Motion to Suppress [R. T. 82-83]. On October 11, 1966, a hearing was conducted out of the presence of the jury, and the court held that the evidence was lawfully seized and, therefore, denied the defendant's motion to



suppress the evidence [R. T. 115].

The facts concerning the arrest were that on April 21, 1966, Buick was travelling outside of Pecos, Texas, in a 1961 Karmann Ghia, with 1965 Florida license plates. Patrolman Whitehead, with Deputy Sheriff Ingram passed Buick's automobile and proceeded to pull off to the side of the road, exit their patrol car and flag down Buick. Buick got out of the car on the driver's side and Patrolman Whitehead asked for the automobile registration and Buick's driver's license. Buick produced a 1966 Florida license plate and registration in the name of Mark Anthony Dansereau. Buick stated that he did not know where his driver's license was but thought it was in a brief case in the car. Buick removed a brief case and placed it on the hood of the car and opened it, but was unable to find a driver's license in the brief case. At this time Deputy Sheriff Ingram observed in the open brief case a chrome plated Derringer pistol, a quantity of money and a gold identification bracelet. Deputy Sheriff Ingram testified that he was aware of a wanted poster for a Robert C. Buick for bank robbery and was trying to recall where he had seen Buick's face. At that time Deputy Sheriff Ingram reached into the brief case, removed the Derringer pistol and the identification bracelet. Deputy Sheriff Ingram then radioed to his office in Pecos, Texas, and determined that there was a fugitive warrant outstanding for Robert Clayton Buick [C. T. 70-75; R. T. 84-107, 113-115]. It must be noted that the only item utilized in the trial was the Derringer pistol and the bullets contained therein [R. T. 81].





Buick's oral testimony and his affidavit constitute nearly all of the statement of facts contained in appellant's brief. Buick's position was that Deputy Sheriff Ingram and Patrolman Whitehead forcibly abused him at the time of stopping his car, they took the brief case from his car, opened it without his consent, and made a search without any probable cause [R. T. 916-929]. At the time of sentencing the court specifically commented upon the fact that the testimony of Buick on the witness stand was less than candid [R. T. 1115]. At this time Buick was sentenced to the custody of the Attorney General for a term of 20 years concurrently on each count, pursuant to the provisions for parole under Title 18, United States Code, Section 4208(a)(2) [R. T. 1115].

#### IV

#### ARGUMENT

- A. THE RECORD IS VOID OF ANY EVIDENCE TO SUBSTANTIATE APPELLANT'S CONTENTION THAT THE ORDER CONCERNING THE EXCLUSION OF WITNESSES WAS VIOLATED.
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In considering appellant's contention that a conspiracy existed to transmit testimony to prospective witnesses, this Court should consider only the evidence in the record. In construing the record of a trial on appeal, the evidence should be considered in a light favorable to the appellee. See Davison v. United States, 368 F.2d 505 (9 Cir. 1966), at 507, n. 3.



A review of pages 842 to 845 of the Reporter's Transcript of the trial will show that appellant's contention is totally without merit. Appellant's counsel, Mrs. Gladys Towles Root, said she was informed that Mrs. Ahders had been observed going into the witness room, where prospective witnesses were waiting. As Mrs. Root said: " . . . I am again making no accusations. . . . It is my opinion that there should be at least an admonition." [R. T. 843] Mrs. Root further stated: "Now, I could be absolutely incorrect. But in the future, so that we do not have this again, if we can have an admonition. . . ." [R. T. 844] The record clearly establishes that counsel for appellant was not at all certain what had transpired in the witness room and merely sought an admonition to prevent any future conversations. The trial court gave the admonition requested, and it was acknowledged by appellant's counsel, who thanked the trial judge [R. T. 845].

From the foregoing facts, it is respectfully submitted that appellant's contention is totally without merit. As counsel for appellant so stated to the trial court, she was basing her allegation upon hearsay, and it was unknown what in fact had happened and that no accusation was being made [R. T. 842-843]. After reviewing the record of this case, it is shocking that appellant can allege this contention of a conspiracy to violate appellant's rights in violation of the witness exclusion order. As the reviewing courts have frequently stated: "We do not presume error; we require the appellant to demonstrate it." Sica v. United States, 325 F.2d 831 (9 Cir. 1963), at 836, cert. denied 376 U.S. 952.



B.      ASSUMING A VIOLATION OF THE  
         WITNESS EXCLUSION ORDER, THE  
         FAILURE OF APPELLANT TO SHOW  
         ANY PREJUDICE RESULTS IN HARM-  
         LESS ERROR.

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While the Government maintains that the record is void of any evidence to substantiate appellant's contention, there exists an additional ground for rejecting this contention. The control of witnesses and their exclusion during a trial is left to the sound discretion of the trial court. See United States v. Bostic, 327 F.2d 983 (6 Cir. 1964). In fact, even if a violation of an exclusion order is established, it is up to the sound discretion of the trial court to determine what measures are necessary to rectify the situation. See Spindler v. United States, 336 F.2d 678 (9 Cir. 1964). Appellant has failed to show any abuse of discretion and in fact appellant obtained the admonition of Mrs. Ahders as requested.

The courts have frequently held that in reviewing the propriety of a refusal to exclude witnesses, an appellant must show that he was prejudiced. Kaufman v. United States, 163 F.2d 404 (6 Cir. 1947), cert. denied 333 U.S. 857; Mitchell v. United States, 126 F.2d 550 (10 Cir. 1942), cert. denied 316 U.S. 702, reh. denied 324 U.S. 887.

Appellant has failed to indicate in any manner how he was prejudiced by Mrs. Ahders having gone to the witness room after being in court. During the trial appellant must have believed this fact to be so insignificant that no effort was made to show what happened or how appellant may have been prejudiced. As previously



stated it is incumbent upon an appellant to establish error, it will not be presumed. Sica v. United States, supra.

C. THE DERRINGER PISTOL WAS PROPERLY ADMITTED INTO EVIDENCE.

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1. Appellant's Contention That the Gun Was Obtained Pursuant to an Unreasonable Search and Seizure is Based Upon a Misstatement of the Evidence.
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In appealing a ruling on a motion to suppress, the evidence is to be construed in a light favorable to the Government. Blefare v. United States, 362 F.2d 870 (9 Cir. 1966). In appellant's statement of the case (Appellant's Opening Brief, pp. 4-9), it is alleged that Officer Whitehead and Deputy Ingram forcibly removed the brief case from the car without any right or consent and opened the brief case that contained the gun, identification bracelet and currency (Appellant's Opening Brief, pp. 8-9). This statement of fact is Buick's version of what happened [R. T. 916-929]. It must also be noted that the trial judge specifically commented that Buick had been less than candid while testifying [R. T. 1115].

The two arresting officers (Officer Whitehead and Deputy Sheriff Ingram), presented testimony concerning the facts of the arrest that are in direct conflict with Buick. All parties agree that Buick was flagged down in a 1961 Karmann Ghia with 1965 Florida license plates. At this time Officer Whitehead was informed that the 1966 Florida license plates should be displayed [C. T. 73-





74]. It was later clarified that the Governor of Florida had issued an order enabling automobile owners to continue using their 1965 license plates until April 20, 1966, a date after Buick was arrested [R. T. 88-89]. However, Officer Whitehead had not been informed of the legality of the 1965 Florida license plate and believed it to be a violation [C. T. 73-74].

After Buick stopped he was asked to display his driver's license. Buick made a search for his driver's license and brought his brief case out of the car [C. T. 71, 74; R. T. 84-85]. Buick opened the brief case to search for his license and Deputy Sheriff Ingram observed a chrome plated Derringer type gun, a gold identification bracelet and an amount of loose currency [C. T. 71-74; R. T. 84-85]. While searching for his license, Buick used a false name and identified himself as Mark Anthony Dansereau. Approximately one hour earlier Deputy Sheriff Ingram had viewed a wanted poster for a man named Buick. After seeing the name on the identification bracelet, Deputy Sheriff Ingram radioed his office, confirmed the fact that Buick was a fugitive, and took him to jail [C. T. 71-74].

Contrary to appellant's argument, the arresting officers did not take the brief case from the car and open it without any authority. It is respectfully submitted that the alleged facts described by appellant are not the true facts as developed in the trial and should be disregarded.



2. The Gun Admitted Into Evidence  
Against Appellant Was Not the  
Product of An Illegal Search and  
Seizure.

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It is conceded that at the time Buick's car was stopped for an apparent vehicle violation, the officers had no right to search the vehicle and the brief case. However, the officers did have a right to inspect Buick's driver's license. See Vernon's Texas Statutes, Article 6687(b), Sec. 2.

The facts of this case also established a second basis for the arrest. Under Article 6701(d), Sec. 153, Vernon's Texas Statutes, Officer Whitehead was authorized to place any person under arrest who was caught operating a motor vehicle without a valid driver's license. Pursuant to making this arrest, the officers were clearly entitled to take possession of the gun which was in plain sight, in order to insure their own protection. <sup>3/</sup> Even a reasonable search incident to the arrest would make the gun admissible. However, in the present case there was not any search.

Appellant contends that the arrest occurred when Buick's car was stopped (Appellant's Opening Brief, p. 11). The Government does not agree with this position. At that time Officer Whitehead was investigating Buick for driving with an invalid license

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<sup>3/</sup> Upon viewing the gun Deputy Sheriff Ingram was obligated to arrest Buick for having a pistol in his brief case, because it violated Texas Penal Code, Chapter 4, Article 483. Article 487 of Chapter 4 exposes Deputy Ingram to a possible fine for not arresting a person he sees carrying a pistol in a brief case.



plate. The Texas Highway Patrol memorandum clearly stated that the license plate on Buick's car was invalid [C. T. 73-75]. This memorandum was in error, but Officer Whitehead clearly had a reasonable basis for stopping Buick. The viewing of the gun, money, and identification bracelet, along with Buick's inability to produce a valid driver's license provided the basis for the arrest as well as Deputy Sheriff Ingram's recollection of the FBI wanted poster and confirmation of this fact [R. T. 70-72; 113-115].

In Busby v. United States, 296 F.2d 328 (9 Cir. 1961), a police officer observed an automobile that had a faulty light over the license plate. Another police officer arrived and the occupants were asked to step out of the automobile. When the automobile door was opened, the dome light illuminated the interior and one police officer observed a sawed-off shotgun lying in the back of the car. The court held that the admissibility of the evidence turned on the narrow question of when the arrest occurred. The court held that the arrest occurred after the sawed-off shotgun had been discovered.

The Busby case, ibid., followed the reasoning of the Supreme Court as set forth in Rios v. United States, 364 U.S. 253 (1960). In Rios, id., at 262, the court stated that the police could approach Rios for momentary interrogation, and if at that time the officers observed a package of narcotics, they would have probable cause to believe a felony was committed in their presence. Once having probable cause to make the arrest, the narcotics would be admissible evidence against Rios. The thrust of this view is that



there was no arrest until the narcotics were observed. This is precisely what happened to Buick in the present case. The pistol, identification bracelet and currency were observed while Buick was searching for his driver's license. Basically, there was no evidence obtained from Buick by any search. It is, therefore, respectfully submitted that appellant's contention of an illegal search and seizure is without merit.

V

CONCLUSION

For the reasons stated the Judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,  
United States Attorney,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

DENNIS E. KINNAIRD,  
Assistant U. S. Attorney,

Attorneys for Appellee,  
United States of America.





CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dennis E. Kinnaird

DENNIS E. KINNAIRD

